No. 14188

In the

United States Court of Appeals

For the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

APPELLEE'S BRIEF

in Answer to Brief of Appellants
Bart McKenney and Marie McKenney.

Appeals from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, Chief Judge

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JURISDICTION

This is a suit in equity for injunctive relief and incidental damages brought in the United States District Court for the District of Oregon by appellee Buffelen Manufacturing Co. (hereafter called "Buffelen"), a California corporation, against Edward M. Buol, a citizen of Washington, appellant McKenney Logging Cor-

poration (hereafter called "the corporation"), a Washington corporation, J. B. Carr, a citizen of Oregon, and appellants Bart and Marie McKenney (hereafter called "the McKenneys") and Einar and Dorothy Glaser, citizens of Oregon. The amount in controversy exclusive of interest and costs exceeds $3,000.00 (Tr., pp. 10-11, 86).

Said appellants have appealed from the final Judgment and Decree of that Court (Tr., pp. 95-96, 107-108, 115-116).

The District Court acquired jurisdiction under 62 Stat. 930, 28 U.S.C.A. §1332. This Court acquired jurisdiction under 62 Stat. 929, 28 U.S.C.A. §1291.

APPELLEE'S STATEMENT OF THE CASE

A. Preliminary Statement.

Appellants Bart and Marie McKenney have presented an extended Statement of the Case containing factual assertions and arguments largely irrelevant to the Specifications of Error available to them.

Of the Specifications supported by argument, those numbered I, II, III, IV and V relate only to the damages allowed by the trial court and the evidence relating thereto.

In Specification VI (McK. Br., p. 43), appellants object to the exclusion of "Pre-trial Exhibit No. 24."

Specifications VII, VIII, IX, X, XI, XII and XIII (McK. Br., pp. 44-45) are wholly unsupported by authorities or argument. These Specifications are therefore abandoned and present no question for the consideration of this court. *Peck vs. Shell Oil Co.*, 142 F.2d 141 at pp. 143, 144 (C.C.A. 9 1944); *Smith vs. Royal Ins. Co.*, 93 F.2d 143 at p. 146 (C.C.A. 9 1937).

In addition, Specifications VI and XIII are improper and should not be considered, because they fail to quote either the full substance of the evidence in question or the grounds urged at the trial for the admission or rejection of the exhibits in question as required by Rule 20(2)(d) of this Court. *Peck vs. Shell Oil Co.*, supra, 142 F.2d 141 at p. 143 (C.C.A. 9 1944); *Jung vs. Bowles*, 152 F.2d 726 at p. 727 (C.C.A. 9 1946); *Butler vs. United States*, 108 F.2d at p. 28 (C.C.A. 8 1939).

Appellee will submit a supplementary Statement of the Case when answering the brief of the other appellants, if the Specifications and contents of that brief require it. Appellee will here correct and amplify the McKenneys' Statement of the Case only as it relates to their first six Specifications of Error.

B. Correction of the McKenneys' Statement of the Case.

The McKenneys assert in their Statement of the Case (McK. Br., p. 8) that Buffelen paid the partners $3,490,-991.88 for 55,546,171 feet of logs under the contract of January 8, 1948, and that it paid the market price without deductions other than sums representing repayment of advances in the amounts of $120,000.00 and $24,000.00. On the contrary, the amount actually paid was $2,490,991.88 (Tr. p. 391), and the contract provided that logs delivered to Batterson should be paid for at the market price less an agreed discount of $.50 per thousand (Tr., p. 132). There is nothing to indicate that this discount was not taken on all logs.

Secondly, the contract provided that stumpage payments were to be deducted from the price of *all* logs delivered at Batterson (Tr., pp. 130-131). The partners, however, prepaid these stumpage charges in the course of their earlier deliveries (Tr., pp. 12, 87, 283). The contract also provided that *after the land was completely logged-off or operations otherwise ceased* the partners should be entitled to a conveyance of *logged-off land* for a nominal consideration (Tr., p. 132). Buffelen therefore was to retain title to the land until the partners had completely performed their contract.

It is also asserted (McK. Br., pp. 9-10) that the Dis-

trict Court held the McKenneys liable as trespassers and entered judgment against them for $50,000.00 and yet held them liable as owners of the same logs for failure to deliver them.

Briefly stated, the McKenneys did not earn their money. The contract required them to cut and deliver logs. They could never deliver logs which were cut and removed by the corporation. Furthermore, as will be seen hereafter, they were held liable, not as original trespassers, but for breaching their covenant not to assign their rights and thereby causing and making it possible for the corporation to trespass against the timber. The land and timber stood in Buffelen's name, and the partners had no rights in it until they performed the contract. The damages for trespass are based upon the value of the converted timber and are unrelated to those caused by their failure to supply the mill with logs. *The McKenneys do not deny liability for the corporation's acts.* They only assert the right to set off against those damages their own rights in the timber, and this they cannot do.

QUESTIONS PRESENTED

1. Does the evidence sustain the trial court's finding that appellee was damaged in the amount of $118,-

000.00 by appellants' breach of their contract to cut and deliver logs to appellee's mill at Batterson, Oregon?

2. Were Exhibits 19a, 19b and 19c, being financial statements showing the profits earned by the Batterson mill from July 1, 1948 to June 30, 1951, admissible to establish earnings lost after October 1, 1951 by reason of appellants' breach of their contract to cut and deliver logs to appellee's mill at Batterson, Oregon?

3. Was appellee entitled to recover earnings of the Batterson mill lost by reason of appellants' breach of their contract to cut and deliver logs to appellee's mill at Batterson, Oregon?

4. Was appellee entitled to recover from the partners the value of logs cut and removed from appellee's land by appellant corporation?

5. Did the trial court abuse its discretion in failing to reopen the case and receive evidence alleged to be newly discovered?

ARGUMENT

I.

The evidence abundantly supports the finding of the trial court that Buffelen sustained damages in the operation of its Batterson mill in the amount of $118,000.00 by

reason of appellants' failure to cut and deliver logs in accordance with the contract of January 8, 1948 (Specifications of Error I and II).

SUMMARY

A. The evidence.

B. The finding is presumed to be correct and must be sustained unless clearly erroneous.

C. Oregon law permits recovery of earnings lost by reason of a breach of contract.

D. Appellee was entitled to recover the use value of the mill as established by its past record of earnings, together with all losses actually sustained.

E. The evidence abundantly supports the trial court's finding.

A. The evidence.

The contract (Tr., pp. 125 et seq.) recites that Buffelen purchased the tracts to supply its Tacoma and Batterson operations and built the mill at a cost of $150,000.00 in reliance upon the partners' promise to cut and deliver logs and to give it the first option on all logs cut from the land. It was understood that no other logs were available (Tr., pp. 129, 135, 139).

Exhibits 19a, 19b, 19c and 22 were prepared directly from the books of the company to show the financial performance of the mill from July 1, 1948 to October 31, 1952 (Tr., pp. 200-201, 462). They show average monthly earnings of 9,000.00 during the fiscal year ending June 30, 1950, and $6,000.00 in the following year. They are based upon the amount of actual operating time, and accurately report costs incurred in the operation of the mill (Tr., pp. 481-482). Prior to the shutdown in June, 1951 the mill had operated on a two- and three-shift basis. (Tr., pp. 214-216). From November 30, 1951 through October 31, 1952, the Batterson mill suffered net operating losses in the amount of $30,533.00 (Tr., p. 480).

Roy Gould, who gave the operating instructions at Batterson as a prospective purchaser of the mill in October and November, 1951, testified that the mill would earn $8,000.00-$10,000.00 per month on a one-shift basis and $14,000.00-$17,000.00 on a two-shift basis if there were a proper log supply (Tr., p. 220). However, he could buy only a few defective logs from Yunkers and Weeks, and as a result the mill could not be operated continuously and lost money during that period (Tr., pp. 220-222, 225-227). Mr. Gould knew Buffelen had demanded logs during the summer of

1951 and initiated his operation believing that deliveries would be made (Tr., pp. 220, 232-233).

He also testified that the market price for lumber rose during 1951 (Tr., p. 221) and that stumpage from Section 6, T. 2 N. R. 7 W. (land standing in Buffelen's name and subject to the contract from which the corporation removed 2,000,000 feet of timber) was worth $25.00 per thousand (Tr., p. 223).

The partners' failure to deliver logs prevented the sale of the mill to Mr. Gould's Diamond Lumber Co. for $250,000.00, since the anticipated sale was predicated upon an adequate log supply (Tr., pp. 231-232, 237). Appellant McKenney testified that the mill was not worth $250,000.00, (Tr., p. 367). Under the terms of the proposed sale, Buffelen was to retain the right of all shop lumber cut at Batterson for use in its Tacoma plant and was theretofore to have a continuing interest in the performance of the contract (Tr., pp. 255-256).

Appellant McKenney testified that the partners were cutting 150,000 to 250,000 feet per day. He denied that the Yunker logs bought by Gould were different from Buffelen's and asserted that other logs were available in the Batterson area (Tr., pp. 301-302).

Two of Buffelen's employees made extensive and persistent efforts to secure logs from other sources, and

they purchased all available logs (Tr., pp. 464-475). They could secure only enough to supply a partial one-shift operation after April, 1952, although Buffelen wished to operate on a two-shift basis (Tr., pp. 470, 474). Furthermore, they were unable to accumulate an inventory which would permit the mill to operate during a strike or a period of fire weather (Tr., pp. 470-471). McKenney Legging Corporation sold its production to National Forest Products, which refused to sell to Buffelen except under wholly uneconomic and unacceptable conditions (Tr., pp. 341-343).

Arnold Magnuson testified that approximately 2,000,000 feet were removed from the Belding (Section 6) tract (land owned by Buffelen and subject to the contract) where he had been cutting as a subcontractor under the partners prior to the attempted sale to the corporation (Tr., pp. 512-515).

B. The finding is presumed to be correct and must be sustained unless it is clearly erroneous.

The findings of the trial court are presumptively correct. Rule 52 F.R.C.P. (which applies to both legal and equitable causes, *Grace Bros. vs. Commissioner*, 173 F.2d 170 at pp. 173-174 (C.A. 9 1949)), provides that findings shall not be disturbed unless "clearly erroneous." *Columbian Nat'l. Life Ins. Co. vs. Quorndt*, 154

F.2d 1006 at pp. 1006-1007 (C.C.A. 9 1946); *Universal Pictures Co. vs. Cummings*, 150 F.2d 986 at p. 987 (C.C.A. 9 1945).

Rule 52 means that findings

> "* * * will not be disturbed if supported by substantial evidence." (*Pacific Portland Cement Co. vs. Food Machinery & Chemical Corporation*, 178 F.2d 541 at p. 548 (C.A. 9 1949)).

It also applies to determinations of the weight of the evidence (*Graver Tank & Mfg. Co. vs. Linde Air Products Co.*, 339 U.S. 605 at pp. 609-610, 70 Sup. Ct. 854, 94 L. Ed. 1097 (1950)) and to conclusions based upon documentary evidence (*U.S. vs. U. S. Gypsum Co.*, 333 U.S. 364 at p. 394, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). See also *West vs. Conrad*, 182 F. 2d. 255 (C.A. 9 1950). The rule

> " * * * requires us to give due weight not only to conclusions drawn by the trier of facts from contradictory testimony, but also to inferences made from testimony which does not stand contradicted directly, but the validity of which is impugned by other evidence in the record, or by legitimate inferences from admitted facts. * * *" (*United States vs. Fotopulos*, 180 F.2d 631 at p. 634 (C.A. 9 1950)).

Furthermore, the finding attacked herein was made after two trials, thorough briefing of the law and the

facts and prolonged deliberation. It can only be reversed if based upon an obvious error of law or a serious mistake of fact. *Gila Water Co. vs. International Finance Corp.*, 13 F.2d 1 at p. 2 (C.C.A. 9 1926); *Easton vs. Brant*, 19 F.2d 857 at p. 859 (C.C.A. 9 1927); *Graff vs. Town of Seward*, 20 F.2d 816 at p. 817 (C.C.A. 9, 1927); *Collins vs. Finley*, 65 F.2d 625 at p. 626 (C.C.A. 9 1933); *Stimson vs. Tarrant*, 132 F.2d 363 at p. 365 (C.C.A. 9 1942). Insofar as the trial court resolved conflicting testimony, the finding will not be disturbed. *United States vs. McGowan*, 62 F.2d 955 at pp. 957, 958 (C.C.A. 9 1933); *Crowell vs. Baker Oil Tools*, 99 F.2d 574 at p. 577 (C.C.A. 9 1938).

C. Oregon law permits recovery of earnings lost by reason of a breach of contract.

In Oregon, as noted by the trial court (Tr., p. 202), the courts are extremely liberal in permitting recovery of earnings lost by reason of a breach of contract. When the fact of damage has been established with reasonable certainty, exact proof of the amount thereof is not required. The Oregon rule in this regard is contrary to that set forth by the Supreme Court of Washington in *National School Studios, Inc. vs. Superior School Photo Service, Inc.*, 40 Wash. 2d 263, 242 P.2d 756 (1952) relied upon by appellants. The wrongdoer cannot defeat

recovery by asserting that the exact amount of the loss he himself has caused cannot be determined.

In *Blagen vs. Thompson*, 23 Ore. 239, 31 Pac. 647 (1892) defendants contracted with plaintiff to build a streetcar line to certain land which plaintiff hoped to develop and sell. Defendants breached the contract, and plaintiff was allowed to recover the amount by which the car line would have increased the value of the property. The court said:

> "As defendants failed and neglected to build the road within the stipulated time, or at all, it may be difficult for plaintiff to prove with exactness what would have been the value of the land with the contract fulfilled; but such uncertainty does not prevent him from recovering such damages as he may be able to prove. He is only required to give such evidence as the nature of the case will permit bearing upon the matter of his damages and legally tending to prove such value: *O'Brien v. Society*, 117 N. Y. 310 (22 N. E. Rep. 954); *Huse Ice Co. v. Heinze*, 102 Mo. 245 (14 S. W. Rep. 756). Where one violates and entirely repudiates his contract with another, the damages sustained by the injured party are, as EARL, J., said, "nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjecture and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as

> to their amount, there can rarely be good reason for refusing on account of such uncertainty any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain': * * *" (At pp. 253-254)

See also *Blanchard vs. Makinster*, 137 Ore. 58 at pp. 65-67, 290 Pac. 1098, 1 P.2d 583 (1931); *Krause vs. Bell Potato Chip Co.*, 149 Ore. 388 at p. 394, 39 P.2d 363 (1934); *Bredemeier vs. Pacific Supply Company*, 64 Ore. 576 at p. 580, 131 Pac. 312 (1913); *Martin vs. Neer*, 126 Ore. 345 at p. 348, 296 P.2d 342 (1928); 1 Sedgwick on Damages 379 (§199) (9th Ed., 1912).

In *McGinnis vs. Studebaker*, 75 Ore. 519, 146 Pac. 825, 147 Pac. 525 (1915), the court said:

> "The theory of the law is to award compensation for gains prevented and for losses sustained when a contract is broken; and a person breaking a contract is liable for the direct, natural and proximate result of his act. The party damaged is not precluded from recovering anticipated profits merely because they are such, since the loss of anticipated profits is a damage that should be compensated for just as much as is the destruction of property. Repeated decisions of this court, as well as the announcements made by courts in other jurisdictions, have firmly established the doctrine that if the business of which the complaining party was de-

prived was contemplated or could reasonably be presumed to have been contemplated by the parties at the time of making the contract, and if it is reasonably certain that a gain or benefit would have been derived, then damages may be recovered. Uncertainty as to the amount of damages does not prevent recovery, but uncertainty as to whether any benefit or gain would have been derived at all does bar a claim for damages. If it is reasonably certain that a gain or benefit has been prevented, then plaintiff is entitled to damages for the amount of that gain or benefit: * * *" (At pp. 522-523)

In the present case the parties knew that the partners' breach would have disastrous consequences. The contract provides:

"Whereas, the primary purpose of the Lumber Company in the purchase of the timber tracts and land listed in Schedules "A" and "B" is to keep its mill at Tacoma and the mill which it is building at Batterson in logs * * *

* * * * * *

"(a) That the Lumber Company has constructed its saw mill at Batterson in full reliance upon the agreement on the part of the Loggers or their successors in interest to provide the logs needed to keep the Lumber Company's mill in continuous operation on a one-shift basis and in the further reliance upon the agreement on the part of the Loggers to give to the Lumber Company the first right or option to purchase at the market price as herein defined, all of the merchantable fir timber coming from the lands either owned or controlled by the

Loggers or by the Lumber Company for use in its plant at Tacoma or for use in its sawmill at Batterson. * * *

* * * * * *

"* * * Likewise, the Lumber Company has installed their mill at a heavy investment, based upon continuous logging operations and a continuous supply of logs from the Loggers, since the only supply of logs which could possibly keep such mill in operation, outside of that particular timber area owned by the Lumber Company, is the logging right of the Loggers. * * *" (Tr., pp. 129, 135, 139)

See *Martin vs. Neer*, supra, 126 Ore. 345 at pp. 350-353, 269 Pac. 342 (1928). The losses here sued for were therefore within the contemplation of the parties, and appellants are liable for them.

D. Appellee was entitled to recover the use value of the mill as established by its past record of earnings, together with all losses actually sustained.

Under Oregon law, the judgment must be sustained by satisfactory evidence (ORS 41.110), and satisfactory evidence of losses caused by a breach of contract which injures an established business was described in *Williams vs. Island City Milling Co.*, 25 Ore. 573, 37 Pac. 49 (1894), which involved recovery of earnings lost

due to the plaintiff's failure to perform a contract to repair the defendant's sawmill. The court said:

> "* * * The defendant had been operating its mill for several years before the breach of plaintiff's contract, and it can show what its average profits had actually been, and *so ascertain with reasonable certainty* what the value of the use of the mill would have been to it during the time it was prevented from operating it on account of plaintiff's breach of the contract, the effect of the change from the 'burr' to the 'roller' process, as contracted for, being of course taken into account. For this purpose, proof of past profits, if any, were admissible in evidence. While it is true the evidence showed, or tended to show, that the mill had no rental value, within the sense that a business house in a populous city has a rental value, yet its actual value to the defendant could have been ascertained with reasonable certainty by reference to the business which it had previously done. * * * We are of the opinion, therefore, that the true measure of damages for the failure to complete the contract within the time stipulated, and for the loss of time occasioned by the attempts of the plaintiffs, after September twentieth, to comply with the terms of their contract, is the reasonable value of the use of the mill during such time, *as ascertained from the past experience of the defendant.*" (Emphasis supplied.) (At pp. 589-591)

See also *Anderson vs. Columbia Contract Co.*, 94 Ore. 171 at pp. 194-196, 184 Pac. 240, 185 Pac 231 (1919); *Pedro vs. Vey*, 150 Ore. 415 at p. 433, 39 P.2d 963, 46 P.2d 582 (1935); *Mississippi & Rum River Boom Co.*

vs. Prince, 34 Minn. 71 at pp. 76-77, 24 N.W. 344 (1885).

Appellee is therefore entitled to recover from the partners, as the loss proximately caused by their deliberate breach of contract, the use value of the mill as thus established together with all actual operating losses sustained during the period of the breach.

E. The evidence abundantly supports the trial court's finding.

The use value of the mill for two years preceding the wilful and deliberate breach of contract committed by the McKenneys is shown by Exhibits 19a, 19b and 19c. These exhibits were prepared by appellee's accountant from the company's books kept under his supervision (Tr., pp. 200-201). They show that after all adjustments for inventory, depreciation and administrative expense the mill earned a profit in fiscal year 1949-50 of $113,309.75 (McK. Br., p. 49). In fiscal year 1950-51, it earned $75,743.78 (McK. Br., p. 51). The average of these earnings is $7,500.00 per month, and the evidence was undisputed that the market improved during 1951 (Tr., p. 221). Corroboration is found in the testimony of Roy Gould that the mill could and should have earned $8,000.00-$10,000.00 per month on a one-shift basis and $14,000.00-$17,000.00 on a two-shift basis (Tr., p. 220).

Exhibit 22 was also prepared by Buffelen's accountant from the company's books and accurately reflects the operation of the mill from June, 1951 through October, 1952 (Tr., pp. 462, 475). Disregarding the months of October and November, 1951 (when the mill was operated by Roy Gould) and giving the partnership credit for profits actually earned in June, August and September, 1952, it establishes that Buffelen sustained net operating losses between December 1, 1951 and October 31, 1952 in the amount of $30,533.00 (Tr., p. 480).

Having shown the net operating loss, appellee was entitled to recover that loss in addition to earnings lost by reason of the breach. *Hopkins vs. Sanford*, 41 Mich. 243 at pp. 248-249, 2 N.W. 39 (1879).

Exhibits 19a, 19b, 19c and 22 are wholly sufficient and convincing evidence to support the finding of the trial court. They show that losses were sustained in the amount of $30,533.00, and that the use value of the mill for eleven (11) months (December 1, 1951-October 31, 1952) was $82,500.00. Total operating losses were therefore $113,033.00, which is the lowest amount the court could have awarded. Considering also the cost and burden of having two employees devote their time to the task of procuring other logs (Tr., pp. 464-475), it is

apparent that the judgment for $118,000.00 was in no way excessive. Damages in that amount were established by the undisputed evidence.

The McKenneys' objections to the sufficiency of this proof are as follows:

(a) It is apparently contended that Mr. Gould's testimony concerning the mill's earning capacity was insufficient to support the judgment (McK. Br., pp. 19-22), and that his testimony that other logs were unavailable is unworthy of belief (McK. Br., p. 28). In support thereof appellants cite the contradictory testimony of appellant Bart McKenney (McK. Br., pp. 29-30).

While the judgment was not based upon Mr. Gould's testimony, it is supported by that evidence. Exhibits 19a, 19b and 19c are corroborated by Mr. Gould's experienced evaluation of the mill's capacity to make substantial earnings (Tr., pp. 219-220) and by his testimony that the market improved in 1951 (Tr., p. 221).

There is no basis in the record or in fact for the McKenneys' assertion that other logs were available (McK. Br., p. 28). The evidence is conclusive to the contrary. Mr. Gould testified that he bought all available and uncommitted logs (Tr., pp. 222, 227). The contract stated that no other logs were available and that

Buffelen had purchased the timber to supply the Batterson mill (Tr., pp. 129, 135, 139). Mr. Holm and Mr. Gansberg by persistent and energetic efforts could supply only a partial one-shift operation and could accumulate no inventory to carry them through a fire hazard period even on that limited basis. (Tr., pp. 470-471). The conflicting opinion evidence of the interested witness, Bart McKenney, was properly disregarded by the trial court, and the court's resolution of that conflict will not be disturbed.

Finally, Mr. Gould's testimony is conclusive that *the partners' breach of contract caused serious injury to the operation of the mill, that the failure to deliver could and did cause heavy losses.* This evidence is substantiated by the testimony of Mr. Holm and Mr. Gansberg (Tr., pp. 464-475) that insufficient logs could be secured and by Mr. Gould's further testimony that the market improved during 1951 (Tr., p. 221).

(b) The McKenneys complain secondly (McK. Br., p. 22) that Buffelen did not prove the amount of its costs sustained in operating the Batterson mill. This is wholly erroneous. The exhibits set forth the costs incurred (McK. Br., pp. 47-52; Tr., p. 480), and the evidence was uncontradicted that they were accurately reported (Tr., pp. 481-482). There is nothing in the

record or the facts to support the suggestion that available evidence was withheld from the court (McK. Br., p. 21).

(c) The McKenneys suggest that sufficient logs were found to sustain a one-shift operation (McK. Br., p. 25) and that their breach therefore caused no damage. The record shows that the mill was entirely shut down following the Gould operation until April, 1952 (Tr., pp. 470, 480). Furthermore, shutdowns during the succeeding months were caused by Buffelen's inability to secure an inventory which would sustain production during periods when logging operations were interrupted (Tr., p. 470).

Furthermore, appellants' obligation under the contract *was not limited merely to supplying a one-shift operation at the Batterson mill.* They were obligated to give Buffelen the first option on all logs cut from the lands (Tr., p. 134), and the mill was installed on the strength of that promise (Tr., p. 135). Buffelen's timber was to be logged at as early a date as efficient logging would permit (Tr., p. 137). The undisputed facts are that the partners were producing from 150,000 to 250,000 feet per day (Tr., p. 301). The mill could cut 50,000 feet on a one-shift basis and 90,000 feet on a two-shift basis (Tr., p. 220). Buffelen had demanded that their entire production be delivered to Batterson

(Tr., pp. 180-182, 229-230, 250; Exhs. 4, 5, 6, 16, 17, 18). Buffelen purchased all available logs for the mill (Tr., pp. 466, 468, 473-474) and desired to establish a two-shift operation (Tr., p. 474). The partners delivered no part of their production. Specifically, they did not deliver enough logs to supply a one-shift operation, to which Buffelen could have added the few logs secured elsewhere and thereby expand its production. It follows that Buffelen desired and appellants were obligated to supply logs which would sustain a two-shift operation at Batterson. Appellants' contention disregards the facts and the express terms of the contract.

(d) Appellants suggest that the judgment was excessive, because the mill was shut down by a strike during May, 1952 (Tr., p. 480) and by a logging shutdown during October, 1952 caused by fire weather (Tr., pp. 470-471). This justifies no special deduction from the damages sustained, because the use value of the mill rests upon a determination of average earnings. Average monthly earnings were abundantly established by Exhibits 19a, 19b and 19c. Appellants themselves having prevented the mill from operating, they cannot say that the production loss sustained during those short periods would not have been compensated for in other months and the average earning rate generally sustained throughout the period in question. Moreover,

if the partners had complied with their contract, there would have been a sufficient inventory at the mill to carry it through such periods.

(e) Appellants assert that Exhibits 19a, 19b, 19c and 22 are insufficient to sustain the finding of damages because they do not show that the transfers within Buffelen's organization were at the market price (McK. Br., pp. 26-27); yet, they were shown to have been prepared from the company's books by its regular accountant (Tr., pp. 200-201, 202, 475). Their accuracy is not questioned. The transfers of lumber to all purchasers are reported as actual sales at specified prices. Finally, no mention was made of this alleged omission at the trial. It is an afterthought, and in the absence of anything to impeach the records either as to their form or contents, they stand as convincing evidence of the actual profits and losses reported therein to have been earned and incurred.

II.

Exhibits 19a, 19b and 19c were properly received by the trial court, and appellants' objection thereto is not well taken (Specification of Error III).

SUMMARY

A. Counsel did not call the attention of the court to the objection now relied upon.

B. In the absence of any proper objection, the court did not err in admitting the exhibits.

C. The exhibits were properly admitted regardless of such objection.

D. Counsel waived any objection to the admission of the exhibits on the ground that the primary books of account were not present in court.

Counsel specified the grounds for his objection to these exhibits at the trial (Tr., pp. 201-203), and the reasons there stated relate only to the question of materiality. Counsel argued (a) that profit and loss statements could not constitute the measure of damages and (b) that the records covered a period not in controversy.

It has already been shown (supra, p. 16) that the rule in Oregon is contrary to these assertions. Records of past earnings are an approved method of establishing damages caused to an established business by breach of contract, and these exhibits show the amount of those earnings.

Nowhere did counsel direct the Court's attention to the objection now asserted, that these exhibits were incompetent in the absence of testimony that the sales reported therein to other units of Buffelen's organization were made at the market price (McK. Br., p. 32). This, in effect, is an objection to the absence of testimony that the books from which the exhibits were prepared were kept according to standard bookkeeping practices. No opportunity was provided at the trial to examine the point or, if necessary, correct it. The law is conclusive that counsel is limited to the objection urged before the trial court, and the present objection cannot now be considered. A similar situation arose in *Employers Mutual Casualty Co. vs. Johnson*, 201 F.2d 153 (C.A. 5 1953), which was a proceeding under the workmen's compensation law of Texas. Certain x-ray films were received in evidence, and on appeal it was contended that they were inadmissible in the absence of preliminary evidence that they had been taken in accordance with "recognized standards." At the trial, however, appellant had challenged only the competency of the witness to interpret films which he himself had not taken. Judgment was affirmed in the following language.

> "* * * When an objection is made to the introduction of evidence, the grounds therefor must be clearly and specifically stated for the benefit of

> the court and opposing counsel in order that the objection, if sustained, may be cured by additional evidence. In the event that error was committed, the appellant waived its right on appeal because of failure to object at the trial and to state the basis on which the objection was made. * * *" (At pp. 155-156)

See also *Norwood vs. Great American Indemnity Co.*, 146 F.2d 797 at p. 800 (C.C.A. 3 1944); *Tucker vs. Loew's Theater & Realty Corp.*, 149 F.2d 677 at pp. 679-680 (C.C.A. 2 1945); *Collins vs. Streitz*, 95 F.2d 430 at p. 437 (C.C.A. 9 1938). In *Maulding vs. Louisville & N. R. Co.*, 168 F.2d 880 (C.C.A. 7 1948) it was said:

> "It is not permissible to so frame an objection that it will serve to save an exception for the action of a court of review and yet conceal the real complaint from the trial court." (At p. 882)

Counsel has cited no authority and we have found none requiring such preliminary testimony. There is no question that the summaries, prepared from books kept under the supervision of the witness (Tr., pp. 200-201, 202), were admissible, *Thompson vs. Arthur L. Hardin Associates*, 219 S.W.2d 860 (Mo. 1949); *Batterson vs. Am. Stores Co.*, 367 Pa. 193 at pp. 206-

208, 80 Atl.2d 66 (1951); 4 Wigmore on Evidence 434 (§1230). Counsel does not assert that they were inadmissible if there had been such evidence, and in the absence of any objection or offer of evidence to the contrary the exhibits must be taken to establish the profit therein stated to have been earned. No reason is suggested for selling the mill's production at any price other than the market, and there is nothing to suggest that any other price was used. The Specification is groundless.

Included in the Specification but ignored in the argument thereon is a colloquy between the court and counsel regarding appellee's failure to have its primary books present in court. It is wholly uncertain whether or not the court's failure to strike the exhibits of its own motion is assigned as error. There was preliminary testimony that the exhibits had been prepared directly from the underlying books (Tr., pp. 200-201), and their accuracy is not questioned. In any event, *no objection was entered nor was any motion made to strike the exhibits from the record.* The underlying books need not always be present, and any objection based thereon was waived. *Burton vs. Driggs*, 87 U.S. 125 at pp. 135-136, 22 L. Ed. 299 (1873).

Finally, appellants not having argued the matter, this part of the Specification was waived.

III.

The trial court applied the correct measure of damages, and appellants' objection thereto is not well taken (Specification of Error IV).

SUMMARY

A. The court properly awarded damages for lost earnings.

Appellants contend that Buffelen can recover no more than the difference between the market price and the contract price of logs, although they admit that if there were no alternative log supply lost earnings could be recovered. (*Norwood vs. McLean*, 153 F.2d 753 at p. 757 (C.C.A. 3 1946); McK. Br., p. 40). This contention is without merit.

The evidence is overwhelming that there was no alternative supply of logs for the mill (Tr., pp. 129, 135, 139, 218-222, 464-475). The only suggestion to the contrary was the interested testimony of appellant Bart McKenney (Tr., pp. 301-302), and the trial court's resolution of this conflicting evidence will not be disturbed.

It is suggested that the general availability of logs at Batterson is "common knowledge" (McK. Br., pp.

28, 35, 40). No circumstances supporting this astonishing contention are set forth, and the record conclusively demonstrates that it is untrue. At the very least, the evidence presented a question for the determination of the trial court. In *Norwood vs. McLean*, supra, 153 F.2d 753 at p. 756 (C.C.A. 3 1946) evidence much weaker than that developed here was held to present a jury question. The circumstances of this case conclusively disprove any presumption that other logs were available. It follows that appellee is not limited to price differences, but may instead recover lost earnings. See *Martin vs. Neer*, 126 Ore. 345 at pp. 353-357, 269 Pac. 342 (1928); *Outcault Adv. Co. vs. Citizen's Nat'l. Bank*, 118 Kans. 328 at p. 330, 234 Pac. 988 (1925).

IV.

The trial court properly entered judgment against the partnership for the value of timber cut and removed from appellee's land by the corporation (Specification of Error V).

SUMMARY

A. Appellants are liable for having caused the trespass, and they do not deny it.

B. Appellants are not entitled to an offset for sums they would have been entitled to receive if they had cut and delivered the logs.

Appellants assert that they are not liable for the value of timber converted by the corporation, because they were entitled to received that value if they performed their contract and logged and delivered the timbr to Buffelen (McK. Br., pp. 41-43).

Appellants were not held liable as original trespassers. They are liable for having caused the trespass by attempting, contrary to the express terms of the contract (Tr., pp. 134-135), to sell timber standing in Buffelen's name and subject to the contract and delivering possession thereof to the corporation, thereby enabling the corporation to trespass against and convert the timber. The trespass was the normal and proximate result of the attempted conveyance, and the partners are liable for the resulting damage. See *Lepla vs. Rogers* [1893] 1 Q.B. 31; 127 A.L.R. 1016; L.R.A. 1918D 220; 34 Am. Jur. 566 (Logs and Timber, §116); 3 Sutherland on Damages (4th Ed., 1916) 3170-3174 (§861). *They do not deny this liability or question the finding that the logs removed were worth $50,000.00.*

Under the contract, appellants were entitled to cut and deliver logs; they were also entitled to a conveyance of logged-off land at a nominal price (Tr., pp. 132, 133). The McKenneys could never earn their money on logs removed by the corporation. They were

not entitled to be paid for it, and thus have no offset to assert against the liability which they do not deny. In *Springer vs. Jenkins*, 47 Ore. 502, 84 Pac. 479 (1906), a mortgagor sued his mortgagee for conversion. The mortgagee pleaded the mortgage and contended plaintiff could recover only the residual value. The plea was held subject to demurrer, and the court said:

> "* * * the answer does not contain facts sufficient to constitute such a defense. *It is not alleged that the defendants were the owners of the mortgage debt at the time of the alleged conversion* * * *" (Emphasis supplied.) (At p. 507)

Cf. *Pedro vs. Vey*, supra, 150 Ore. 415 at pp. 430-432, 39 P.2d 963, 46 P.2d 582 (1935).

Appellants cannot and do not contend that they were entitled to anything for timber removed by the corporation and sold to third persons. They do not deny that the timber stood in Buffelen's name. Under the contract, they had no interest in it or right to its proceeds until they performed the contract. Having breached the contract, the contention that they are entitled to an offset is without merit.

This recovery is in no way duplicitous. Having caused the trespass by their own wilful act, appellants are liable for the resulting damage. This liability is separate and apart from that incurred for failure to

cut and deliver logs to Batterson, which is measured by lost earnings, not the value of the stolen timber.

V.

The trial court did not err in rejecting "Pre-trial Exhibit 24," and appellants' objection thereto is not well taken (Specification of Error VI).

SUMMARY

A. Specification of Error VI is fatally defective.

B. Counsel did not ask that the trial court receive the evidence.

C. The reception of newly-discovered evidence is discretionary with the trial court, and appellants do not contend that the trial court abused its discretion.

D. Appellants did not show that they had exercised due diligence in discovering the proposed exhibit.

As pointed out above, Specification VI is fatally defective, because it does not set forth the full substance of the rejected evidence and the grounds urged for its admission at the trial as required by Rule 20 (2) (d) (supra, p. 3). In any event, counsel specifically stated at the hearing that he did not desire the case to be reopened to admit the exhibit (Tr., p. 554).

Furthermore, the reception of newly-discovered evidence following trial is discretionary with the trial court, and there are no circumstances whatever indicating that the court abused its discretion in refusing to admit the exhibit, which was offered June 8, 1953, six (6) months after the second trial and seventeen (17) months after the original trial of the case. Counsel does not assert that the trial court abused its discretion in rejecting the exhibit (McK. Br., pp. 43-44). *See Gerson vs. Anderson-Pritchard Production Corp.*, 149 F.2d 444 at pp. 446-447 (C.C.A. 10 1945); *Johnson vs. Cooper*, 172 F.2d 937 at p. 941 (C.A. 8 1949); 4 Cyc. Fed. Proc. 71-77 (§34.05).

Finally, appellants did not show that they exercised due diligence in locating the exhibit, which was a purported earlier contract signed by them but never before referred to. *Grant County Deposit Bank vs. Greene*, 200 F.2d 835 at p. 841 (C.C.A. 6 1952); *Raske vs. Raske*, 92 Fed. Supp. 348 at p. 350 (D.C. Minn. 1950).

The court did not err in rejecting the exhibit.

In any event, the earlier contract would be superseded by a later and inconsistent contract and would not assist in any way in the construction of the latter (A.L.I. Restatement of the Laws of Contracts §408). It is not suggested that the contract of January 8, 1948

was merely an integration of the earlier contract; it specifically states that the only agreements still existing and being integrated therein are oral agreements (Tr., p. 129). The earlier agreement is therefore not admissible to construe its terms (A.L.I. Restatement §238).

CONCLUSION

Appellants have taken an extraordinary position. Having committed a wilful and deliberate breach of contract with full knowledge that it would destroy a large capital investment and cause appellee heavy operating losses, they now assert in effect that they should be relieved of liability because there is insufficient evidence of the precise amount of the damages caused by the breach. That they caused damage is not actually contested; only the amount is considered excessive (see Specifications of Error I, II, IV).

The type of loss sought to be recovered is seldom susceptible of exact proof, but the proof in this record is wholly sufficient to show both the fact and the amount of damage. It was the only available evidence and entirely supports the findings of the trial court.

The law does not require the impossible, nor does it permit wrongdoers the benefit of every doubt. It

requires primary proof of injury, and the record proves conclusively that Buffelen was injured. It lost 2,000,000 feet of its timber supply worth $50,000.00, and in place of a profit of $7,500.00 per month it sustained net losses in eleven (11) months in excess of $30,000.00. Buffelen's operation at Batterson was delayed and restricted by lack of logs which it was appellants' obligation to supply. There was no alternative log supply and Buffelen sustained heavy losses. Its experience in this regard was identical with that of Roy Gould, who operated the mill for a short time.

There being a conclusive showing of injury, the remaining question is whether, under the liberal Oregon rule, there was sufficient evidence of the amount thereof. Consistently with the Oregon rule, past earnings and actual operating losses were shown, together with the value of the converted timber. It was shown that two employees devoted their time to the job of attempting to minimize those losses. Substantial evidence was offered of improved market conditions. This evidence was not contradicted in any manner, and fully supports the trial court in the amount of its award.

As was said in 53 L.R.A. 33 at pp. 71-72:

> "The profits to be derived by the lumberman from logging and lumber contracts are not only

proximate and direct, but also peculiarly certain owing to the facility and accuracy with which the cost of execution may be estimated."

The evidence is not only substantial and sufficient to support the court's findings; it is conclusive that the damages awarded were proper in amount. The appeal of appellants Bart and Marie McKenney, seeking a third trial of this case, must be dismissed and the Judgment and Decree of the trial court affirmed.

Respectfully submitted,

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